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IN THE
Supreme Court of the United States

OCTOBER TERM, 1947.

—
No. 535.
—

LEON JOSEPHSON, *Petitioner*

v.

THE UNITED STATES OF AMERICA.

—
**MOTION OF NATIONAL LAWYERS GUILD FOR
LEAVE TO FILE BRIEF AS AMICUS CURIAE,
AND BRIEF AMICUS CURIAE.**
—

NATIONAL LAWYERS GUILD,
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**APPLICATION FOR LEAVE TO FILE BRIEF AS
AMICUS CURIAE.**

The National Lawyers Guild prays for leave to file a brief as amicus curiae in connection with the petitioner's application for re-hearing upon the denial of his petition for writ of certiorari in the above entitled case. The National Lawyers Guild is an organization of members of the bar devoted, among other things, to the protection of our democratic institutions and the civil rights and liberties of all the people. Because it believes that the denial of certiorari in the instant case leaves undecided an issue of the greatest importance to the American people, and to the maintenance of our civil liberties, it respectfully requests leave to file a brief as amicus curiae in support of the petitioner's application for rehearing.

BRIEF.

This Court grants review on writ of certiorari in its "sound judicial discretion" and "only where there are special and important reasons therefor." Such reasons generally exist when a circuit court of appeals "has decided an important question of federal law which has not been, but should be, settled by this court; or a federal question in a way probably in conflict with applicable decisions of this court." Supreme Court Rule 5.

So far as the standard of probable error below is concerned, we are content to rest on the persuasive dissenting opinion of Judge Clark. As for the issues involved, chief among them is the challenge to the constitutionality of the resolution under which the House Committee on Un-American Activities compels testimony. The importance of this question was recognized by both the majority judges and the dissenting judge in the decision below. The majority opinion refers to it as "this exceedingly important point," and Judge Clark's dissent calls it "one of the more momentous which has come before us."

In our view, this issue is of such transcending public importance as to place on this Court a responsibility to accept the earliest occasion offered for its review.

(1) Our most cherished freedoms are today threatened by post-war currents of political and economic insecurity, instability and reaction. Following the First World War, an intense agitation against "radicalism" led to shameful episodes in our national history: the Palmer raids, the ouster of Socialists from the New York legislature, various convictions under state "anti-radical" or "anti-syndicalism" statutes, the executions of Sacco and Vanzetti, etc. Today's even greater agitation against alleged Communists and Communism, occurring in a period of greater stress, is even more dangerous to the civil liberties of the people.

The President's Committee on Civil Rights has recently reported that public excitement about "Communists" has engendered "a state of near-hysteria" which "threatens to inhibit the freedom of genuine democrats." *To Secure These Rights* (1947) 49. More than any other single agency or group, the House Committee on Un-American Activities has contributed to this near-hysteria. It is this atmosphere which has given rise to the President's recent "loyalty" order, to the publication thereunder by the Attorney-General of names of so-called "subversive" organizations, to the wave of deportation proceedings against alien dissidents, to the Taft-Hartley Act's anti-communist affidavits, to executive attempts to cancel tax exemptions heretofore enjoyed by certain left-wing educational or charitable organizations, to the large number of contempt prosecutions against persons who have refused to disclose their political views and affiliations, and to the movie industry's recent discharge of ten leading artists. The distorting "exposures" of the Committee¹ have imperiled the survival of virtually every organization with reformist political and economic aims.

The fact is, of course, that the Committee is not an investigating committee at all. Instead, under an investigative guise it operates as an agency of Congress to suppress reformists, progressives, and radicals by use of propaganda, censorship through "exposure,"² and economic blacklisting.³

¹ See Gellhorn, *Report on a Report of the House Committee on Un-American Activities*, 60 Harv. L. Rev. 1193.

² Regulation by "exposure" in fields immune to direct Congressional regulation is the Committee's self-admitted chief function. H. R. Rep. No. 2742, 79th Cong., 2d Sess., p. 16 (1947); H. R. Rep. No. 2, 76th Cong., 1st Sess., p. 13 (1939); H. R. Rep. No. 1, 77th Cong., 1st Sess., p. 24 (1941); 83 Cong. Rec. 7570 (1938) (Representative Dies).

³ Note, *Constitutional Limitations on the Un-American Activities Committee*, 47 Col. L. Rev. 416, 418, 419 (1947).

Surely the question of the validity of the authority of a Committee which is so powerful, so effective, so controversial, and, in the eyes of many, so dangerous, is "an important question of federal law" which "should be settled by this court." Or if there is a question as to who can challenge the Committee's authority, that itself is a question of almost equal importance.

(2) In *Journey v. MacCracken*, 294 U. S. 125, 150, Justice Brandeis, speaking for the Court, gave assurance that the ground for fears of abuse of the Congressional investigating power had been "effectively removed by the decisions of this Court which hold that assertions of congressional privilege are subject to judicial review." We suggest that this assurance is largely negated if, in such an extreme and important application of the Congressional investigating authority, this Court refuses to review a decision by a Circuit Court of Appeals, one member of which wrote a vigorous dissent.

The importance of freedom from "unlawful inquisitorial investigations" and from "unauthorized, arbitrary or unreasonable inquiries" has been recognized by this Court. *Jones v. S. E. C.*, 298 U. S. 1, 28; *Sinclair v. United States*, 279 U. S. 263, 292; see *F. T. C. v. American Tobacco Co.*, 264 U. S. 298, 305, 306. The Committee on Un-American Activities engages in inquisitorial investigations which probe deeply into belief and expression, and its statutory authority permits its practices. The Committee's authority to investigate "propaganda" is qualified only by two adjectives—"un-American" and "subversive." These words are, in usage, in the Committee's practice, and by legislative history, synonymous with "distasteful." Hence the Committee is limited only by its own self-imposed restrictions.⁴ Not in American history has any other Congressional committee exercised so vast an investigative jurisdiction. As Judge Clark remarked in his dissent, "the neces-

⁴ Note, *Constitutional Limitations on the Un-American Activities Committee*, 47 Col. L. Rev. 416, 419-423.

sity of decision becomes all the more pressing when, as I think it obvious, no more extensive search into the hearts and minds of private citizens can be thought of or expected than that we have before us."

If Congress may validly engage in such roving and unrestricted inquiries, with full utilization of the subpoena power, then there is no longer any force in the doctrine repeatedly enunciated by this Court that Congress' investigative power is ancillary, limited, and subject to judicial review. *Kilbourn v. Thompson*, 103 U. S. 168; *McGrain v. Daugherty*, 273 U. S. 135; *Jurney v. MacCracken*, 294 U. S. 125; *Sinclair v. United States*, 279 U. S. 263; *In re Chapman*, 166 U. S. 661. For in the instance of this Committee the assertion of Congressional investigative authority has reached the ultimate, and this in a field—the expression of ideas—which Constitutionally presents extraordinary resistance to legislative intrusion.

Surely so great a reversal of established Constitutional doctrine should be passed on by this Court.

(3) Finally, a decision by this Court on the validity of the Committee's authority is important to the administration of law. In the District of Columbia courts there are now pending at various stages of trial, pre-trial, or appeal, sixteen criminal prosecutions, involving twenty-seven defendants, for contempt of the Committee on Un-American Activities. In each of these cases, there has been or will be raised the defense that the Committee's powers are invalid.

The respondent challenges the standing of the petitioner to question the validity of the Committee. It asserts that constitutional issues may be raised only with respect to specific questions asked of a summoned witness and are thus not available to the petitioner, who refused to be sworn and announced at the outset that he would not answer any questions.

The petitioner's actions were, of course, simply a refusal to respond to the Committee's subpoena. It is abundantly

clear that a person who has refused to respond to a subpoena may challenge the validity of the subpoena. *Cf. Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186; *F. T. C. v. American Tobacco Co.*, *supra*; *Jones v. S. E. C.*, *supra*; *Hale v. Henkel*, 201 U. S. 43. A contrary holding would be tantamount to a partial repeal of the Fourth Amendment. And this Court has subjected to review the investigative authority of a Congressional committee as a whole when its right to summon was contested. *Kilbourn v. Thompson*, *supra*; *McGrain v. Daugherty*, *supra*. If these rules of law, established by this Court, are to be reversed, so that henceforth no person may challenge the right of a Congressional committee to compel attendance, it is this Court alone which is the appropriate tribunal to effect the reversal.

CONCLUSION.

The order denying certiorari should be vacated, and certiorari should be granted.

Respectfully submitted,

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